

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CAROL LEWIS,

Plaintiff,

v.

Case 1:15-cv-13530-NMG

DON WRIGHT,

*in his official capacity as acting secretary,
United States Department of Health and Human
Services, 615-F, Hubert H. Humphrey Building
200 Independence Avenue, SW,
Washington, DC 20201,*

Defendant

MOTION FOR LEAVE TO SUBMIT NOTICE OF SUBSEQUENT AUTHORITY

Plaintiff Carol Lewis respectfully files this motion for leave to submit notice of subsequent authority.

On October 26, 2017, the United States District Court of the Eastern District of Wisconsin issued a decision in *Whitcomb v. Hargan*, Case No. 17-CV-14 (E.D. Wisc.) (Jones, J.). For the convenience of the Court, a copy is attached. There, the Court held that a Medtronic MiniMed Continuous Glucose Monitor (CGM) is primarily and customarily used to serve a medical purpose. Decision at 3, 10. The Court further held that HHS' interpretation of the durable medical equipment (DME) provisions of 42 C.F.R. § 414.202 as requiring DME to serve a "primary medical purpose" was unreasonable. Decision at 12. The Court further held that HHS' claims regarding CGMs were arbitrary and capricious in that they conflict with National Coverage Determination (NCD) 280.1. Decision at 14. The Court further held that HHS' denial of CGM coverage was arbitrary and

capricious in light of more than 40 final ALJ determinations that a CGM is DME and qualifies for coverage and in further view of the Secretary's other adjunctive decision.

These holdings are relevant to at least Docket Nos. 48 (plaintiff's motion for summary judgment); 51 (defendant's motion to affirm); 60 (motion to alter or amend), 61 (opposition to motion to alter or amend).

Dated: October 27, 2017

Respectfully submitted,

CAROL LEWIS, By her attorneys,

/s/ Laurie J. Bejoian

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CERTIFICATE OF CONFERENCE

On Friday, October 27, 2017, counsel for Ms. Lewis conferred with Anita Johnson, the AUSA representing HHS. Ms. Johnson does not oppose our motion.